82-1081

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

NO. _____

ESTATE OF WILLIAM A. FRIEDERS, DECEASED,
ELMER FRIEDERS, EXECUTOR,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE
SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

Could the Tax Court consider 5 sales of property having "special value" to the Buyer as any evidence of market value?

Could the Tax Court consider Illinois tax assessment records as any evidence of market value?

Did the Tax Court abuse its discretion in denying the taxpayer leave to file his motion to vacate and/or revise decision?

PARTIES

Caption in this cause contains the name of all parties.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit filed August 30, 1982 and reported at 678 F2d 224, appears at page 1a of the Appendix; the opinion in the Tax Court, reported at 40 T.C.M. 403 is reproduced at page 9 a.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on August 30, 1982. A timely petition for rehearing was denied on September 23, 1982, and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

STATEMENT OF CASE

Page references are to pages of the transcript.

William Frieders died on May 14, 1973, leaving an estate which included a ninety-two acre family farm. His estate valued the farm at $2,000 per acre. The Commissioner assessed a value of over $5,000 per acre. The estate brought this action in Tax Court, seeking a redetermination. At the trial, the Commissioner took the position that the farm was worth $5,000 per acre.

The Frieders' farm is located in DuPage County, Illinois, about thirty miles west of Chicago. There was invest--ment activity in the area at the time of Frieders' death, including activity by the Crown family of Chicago. The Crowns, acting through trusts, bought 4,000 acres

of property near the Frieders' farm.

The Government presented one expert witness, Donald Neuses, who relied primarily on the selling prices of six properties near the Frieders'farm. Five of the six properties were bought by the Crowns as part of an assemblage, and the price per acre of the five properties ranged from $5,693 to $7,653. (Appendix-pp 12a - 16a). The Government, over objection, introduced assessment records which placed on the Frieders' farm a fair market value for real estate tax purposes of $4,986 per acre for 1972. (pp 231-234).

The taxpayer presented three witnesses. Gerald Anderson, the real estate broker for the Crown family, testified that the Crown family purchased 4,000 acres of property along the corridor of the proposed Fox Valley Freeway. They

began in late 1969 and concluded in 1973. (pp 101, 102 and 122). They began acquiring property along Route #34, Ogden Avenue, and gradually began to move north along the freeway. The last parcels of property were acquired near the Frieders' farm. There was a perception among potential sellers as to the existence of acquisition activity in the area. (pp 102-109). He had tried to acquire the Frieders parcel together with two other adjoining parcels as one package. The Crown group wanted to acquire the three parcels as a package for about $6,000.00 per acre. But the owners came back with a lot bigger numbers. The whole thing just fell apart. (pp 157-160). The Crown family stopped its acquisition activity in 1973. (p 123). Five of the six parcels relied upon by the government were part of the Crown Assemblage.

Each of the five parcels were acquired from unwilling sellers. They did not have the property on the market. (pp 114-122).

Wilton Battles, a land planner, testified as to the lack of comparability between the Frieders' farm and the Neuses comparables. (pp 54-62). He further testified that the Frieders' farm for land development purposes, is an extremely marginal piece of property because its soil types are not suitable for septic systems and public sewer and water was not available. (p 41). It has no road frontage except for a road that dead ends to the Frieders' property. (p 52).

Another witness testified that the value of farmland throughout Illinois increased by 241 percent between 1973 and 1979. (p 98). The estate offered, as a

comparable, a parcel of property directly west of the Frieders' property. It was sold on contract in December of 1971 as two separate parcels at $3,000 and $3,200 per acre. The parcels to the west had 800 feet of road frontage on Reckinger Road and had access to sewer and water. (pp 130-135).

The Tax Court found that the fair market value of the Frieders' farm was $5,000 per acre. The court relied principally on the testimony and report of the Government's witness, Donald Neuses. (Appendix - pp 42a - 43a).

The court filed its Memorandum Findings of Fact and Opinion on May 27, 1980. On December 20, 1980, more than seven years after the death of William Frieders, the Frieders' farm was sold for $5,000 per acre. The Tax Court decision was not entered until July 23,

1981, because of the time it took to compute the deficiency pursuant to Tax Ct. R. 155. On October 13, 1981, the estate submitted a motion to vacate or revise the decision, (Appendix pp 44a - 57a), based on the evidence of the actual sale price of the Frieders' farm. The Affidavits submitted with such Motions set forth that the sale took place only after:

A. The City of Aurora, in 1980, adopted a plan to build a road that would provide the Frieders' property with over 1,000 ft. of road frontage, and (Appendix - pp 46a).

B. The Aurora Sanitary District, in 1980, pursuant to a mandate of the local circuit court, revised its plans to provide sewer and water service to pro-

perty to the east, including the Frieders' property. (Appendix pp 46a).

In 1980, prior to such changes, Frieders received only one oral offer to purchase the property for the sum of $300,000 ($3,271 per acre). (Appendix - pp 52a). Prior thereto, in 1979, the property was also on the market. Frieders received no offers in 1979. (pp 126-130).

The Tax Court denied Leave to File the Motion. (Appendix - p 58a).

REASONS FOR GRANTING THE WRIT

I

THE DECISION OF THE COURT OF APPEALS BELOW IS IN CONFLICT WITH ILLINOIS AND TAX COURT DECISIONS THAT HOLD THAT SALES THAT HAVE A "SPECIAL VALUE" TO THE BUYER ARE NOT ADMISSIBLE AS EVIDENCE OF MARKET VALUE.

A sale with special value to the buyer, such as a key sale in an assemblage, is not a "comparable" sale and is not admissible as evidence of market value. Henry Finck Co., 4 BTA 1188, (1926); Department of Transportation vs. Prombo, 63 Ill. App. 3d 407, 379 N.E. 2d 953, (3d Dist. 1978); Trustees of Schools of TP., etc. vs. Chicago City B & T Co., 126 Ill. App. 2d 302, 262 N.E. 2d 80 (1970).

In Finck, appreciation in value of land between 1913 and 1918 was an issue. In cross-examination, counsel for the Commissioner elicited the fact

that Henry Finck bought 429.24 acres of delta land in 1913 for $78.54 per acre, and that in 1918, he sold 102 acres of that tract at $150 per acre. In redirect examination counsel for the petitioner established that the parcel sold was situated at least seven miles from the property of the petitioner, and that the purchaser was willing to pay more than market value because he needed that acreage for the construction of ditches necessary to the economic completion of irrigation and drainage works on a much larger adjacent tract that he owned at that time. The Tax Court held:

> "To our minds, this transaction is without probative value to support the contentions of the Commissioner." 4 BTA 1188, at 1191.

In Department of Transportation vs. Prombo, the State Department of Transportation appealed an award of compensation in an eminent domain case. It argued that the testimony of the condemnees appraisal witness should be stricken because his valuation of the subject property was based on sales which were part of an assemblage having a special value to the buyer.

The appraiser had used as comparables four parcels of property purchased by a bank for a parking lot. The first three properties (one in January, 1972, and two in September, 1972), were purchased for $7.61 per square foot, $7.14 per square foot and $6.79 per square foot, respectively. However, the last parcel purchased, completing the assemblage in September, 1973, cost $15.90 per square foot. The Court held:

> "It is apparent that the bank, having acquired three of the four properties, placed a "special value" on this property and was forced to pay a premium. This sale is not comparable and should not have been admitted into evidence." 379 N.E. 2d 953, at 957.

In Trustee of Schools, the lower court had allowed into evidence the sale of four 25 foot lots that had been purchased by an adjoining property owner for the purpose of enlarging his laundry and making a parking lot. The Appellate Court, in reversing, held that the "special value" placed upon the property by the adjoining owner, prevents the sale from being a similar sale as contemplated by the rules.

The Court of Appeals in affirming the Tax Court, speculated that the Tax Court "assumed that assemblage purchases bring higher prices. (Appendix - p 6a). However, the Tax Court did not have the right to even consider such evidence. The

evidence was not admissible. The three cases previously cited by the taxpayer clearly state that such evidence is not admissible.

In Finck, the Court held:

> "To our minds, this transaction is without probative value to support the contentions of the Commissioner". 4 BTA 1188, at 1191.

In Department of Transportation vs. Prombo, the Court held:

> "This sale is not comparable and should not have been admitted into evidence". 379 N.E. 2d 953, at 957.

In Trustees of Schools, the Court reversed holding:

> "The error in considering the sale was prejudicial". 262 N.E. 2d 80, at 82.

It is also clear that the Tax Court never "assumed" that assemblage purchases bring higher prices. The Tax Court specifically found that "These were all bona fide sales between willing sellers and willing buyers." (Appendix - p 13a). It rejected the

contention "that the sales of five of the six parcels used as comparables by Mr. Neuses involved "unwilling sellers". (Appendix - p 34a).

The uncontradicted testimony at trial was that five of the six comparables relied upon by Mr. Neuses, the government appraiser, were sales that had a "special value" to the buyer.

The broker, Anderson, testified that five of the six parcels relied upon by Neuses were purchased by the Crown group from sellers who did not have their property on the market. The procedure he used would be to go to these prospective sellers and ask them if they would entertain an offer. In many cases, they would say "no". He would attempt to create a need for them to move out of the area. He would go out and find trade farms for them. If they didn't like one

because of the farm, he would go out and find another farm with the right kind of barn on it and go back to them again and again. It involved many personal visits and just traveling all over the country, trying to find them some place to better their income flow or their cash flow. He would have to contact the average seller about 20 or 25 times. (p 114-115).

In acquiring parcel 6, Anderson flew to Dallas six times to talk to Mr. Timmons about selling. They weren't interested in selling. Timmons flew into Aurora, calculated what he thought would be the value of the land in the future, and came up with a figure of $7,400.00, take it or leave it. Anderson took it. (p 115-116).

Parcel 12 involved negotiating with three partners. (Transcript p 118). Acquiring parcel 11 involved negotiating

between 8 months and a year. Mr. Lorenz eventually sold the parcel after we found him a farm west of Route 47. His wife liked the brick home and the size of the farm. She talked him into selling it and moving out there. (p 119).

Parcel 14 was acquired to give continuity to the north portion of the Crown Assemblage to the City of Aurora. We had to pay extra to get that parcel away from the family. (Transcript p 120). Parcel 15 was acquired to gain access to Route 65 for the Crown Assemblage. Parcels 6, 11, 12, 14 and 15 were all acquired from unwilling sellers. (p 120-122).

These sellers only sold the property when their will not to sell was overcome by the persistence of Gerald Anderson, the broker for the Crown family. Their desire not to sell was overcome by a price substantially above

the market.

It is clear that the above five comparables relied upon by Mr. Neuses, the government's appraiser, involved sales that had a "special value" to the buyer. The sales did not involve willing sellers, i. e., persons who "desired" to sell their property. 429.59 Acres of Land. 612 F 2d 459, at 462 (9th Circ. 1980).

The Tax Court, in its Finding of Fact, indicated that it relied principally upon the appraisal report and testimony of Neuses. (Appendix - p 42a). Five of these were not admissible as "comparable" sales.

It is respectfully suggested that the Tax Court erred in relying upon the Neuses appraisal report and testimony. The decision of the Court of Appeals affirming the Tax Court should be reversed.

II

THE DECISION OF THE COURT OF APPEALS BELOW IS IN CONFLICT WITH ILLINOIS AND FEDERAL DECISIONS THAT CLEARLY HOLD THAT ASSESSMENT RECORDS ARE INCOMPETENT EVIDENCE OF VALUE.

Illinois decisions have consistently held that the assessed valuation of the property as shown on the Assessor's books is incompetent. County of Mercer v. Wolff, 237 Ill. 74, 81, 86 N.E. 708, 711 (1908), Lewis v. Englewood Elevated R.R. Co., 223 Ill. 223, 79 N.E. 44 (1906); City of Chicago v. Building Corp., 11 Ill. 2d 431, 143 N.E. 2d 40 (1957); Dept. of Public Works v. Cohen, 9 Ill. App. 3rd 85, 291 N.E. 2d 883 (3rd Dist. 1972).

In the cause before this Court, the government offered into evidence the certified assessment records of the Township Assessor of Naperville. The Assessor was not called as a witness. (pp 231-232). The records were allowed

into evidence over objection.

The Tax Court erroneously relied upon such evidence. In its Memorandum Findings of Fact and Opinion, it concluded its findings of fact with the following paragraph:

> "The Frieders' property (exclusive of improvements) was determined in 1972 to have a fair market value for DuPage County real estate tax purposes of $458,712 or $4,986.00 per acre." (Appendix - p 21a).

The Court of Appeals in this cause held that the assessment records were material.

> "However, under Illinois law at the time of Frieders' death, assessment records could be material. An Illinois statute required that property be assessed at its "fair cash value," Ill. Rev. Stat. ch.

120 §§ 501(1) (1971), and defined "Fair cash value" as fifty percent of the actual value. Id at §§ 482 (24). In light of this statutory requirement, the assessed value would be material." (Appendix - p 6a).

This holding is in conflict with all Illinois decisions as to the materiality of assessment records as evidence of market value.

The County of Mercer decision simply finds such evidence to be incompetent:

> "The appellants offered to prove by the assessor's book the assessed value of the property for 1907. The evidence was incompetent. The assessor might have testified to his judgment of its value but the

amount at which he assessed it was immaterial." (237 Ill. 74, at 81).

City of Chicago v. Building Corp. held:

"The determination of assessed value, being for a different purpose, is not a fair criterion of its fair cash market value. Both reason and weight of authority are against the competency of this evidence." 11 Ill. 2d 431, at 439.

In Lewis v. Englewood Elev. R.R. Co., the Illinois Supreme Court held:

"The assessor himself might have been a competent witness, but his statement of value as shown by a tax receipt was not competent. Both reason and the weight of authority are against the

competency of this evidence."

223 Ill. 223, at 228.

At about the time of the assessment in question, the Illinois Appellate Court in Dept. of Public Works v. Cohen, held:

> "It is common knowledge that property is not assessed for tax purposes as its true market value but instead for the purpose of satisfying the revenue demands of various tax supported bodies."
>
> 291 N.E. 2d 883, at 886.

The language in the case of United States v. Certain Parcels of Land, 261 F. 2d 287, (4th Cir. 1958), while referring to assessed valuation, is applicable in the instant case;

> "Aside from the general unreliability of tax assessments as an indication of market value, which

ought to make them suspect in any case, the assessing officials are representatives of the public. The power of a tax official to bind the public is limited, and what he does for purposes of taxation, should not be binding upon the public, or prejudicial to the public interest, when other public officials are engaged in the performance of a very different public function in an unrelated field. Though the tax official may purport to use market value as the criterion of assessed value, his primary concern is with relative, not absolute, values. ***." 261 F 2d 287, at 291.

There is no authority for the Court's finding that assessment records are material evidence of market value.

III

THE TAX COURT ABUSED ITS DISCRETION IN DENYING THE TAX PAYER LEAVE TO FILE HIS MOTION TO VACATE AND/OR REVISE DECISION

The Tax Court should exercise its discretionary power under Rule 162 and grant the tax payer leave to file a proper new evidence motion beyond the thirty day period. Brannon's of Shawnee, Inc., vs. Commissioner, 69 T.C. 999 (1978).

The trial in the Tax Court took place on December 11, 1979. On May 27, 1980, the Honorable Judge Dawson filed his Memorandum of Findings of Fact and Opinion. (Appendix - p 9a). On December 20, 1980, Frieders sold the property in question for $5,000 per acre. (Appendix p 56a). On July 23, 1981, the Tax Court, pursuant to

Rule 155 computation, entered its decision in this cause.

On October 15, 1981, the Tax Court entered an Order denying Frieders leave to file his Motion to Vacate and/or Revise Decision received by the Clerk of the Tax Court on October 13, 1981. (Appendix pp 58a - 59a).

The United States Court of Appeals found no abuse of discretion by the Tax Court. However, it did comment on the importance of the new evidence.

> "This issue is important because, if the property was worth $5,000 per acre in 1980, one would consider it unlikely that the property was worth $5,000 per acre in 1973, in view of the substantial, continuing inflationary status of the economy between 1973 and 1980. Nevertheless, we cannot say that the court abused its discretion." (Appendix - p 7a).

Frieders' Motion to Vacate and/or Revise Decision met all of the criteria for a proper new evidence motion and should have been considered by the Tax Court. The evidence presented by Frieders that he sold the subject property in December of 1980 for $5,000 per acre dramatically established that the subject property was not worth $5,000 per acre in May of 1973. There was evidence presented at trial that Illinois farm land was worth 341% as much in 1979 as it was in 1973. (p 97). In addition, the new evidence demonstrated that Frieders was able to secure $5,000 per acre for his farm only after it was published in the fall of 1980 that a proposed road had been scheduled along the southern boundary of the Frieders' farm and that sewer and water was available to the farm as a result of

a Declaratory Judgment which ordered that the Waubonsie service area be expanded to the east.

The new evidence is admissible and credible and of such a nature as will probably change the outcome. Krock vs. Elec. Motor & Repair Co., (CA. 1st, 1964), 339 F2d 73. It is respectfully suggested that the Tax Court abused its discretion in failing to consider the foregoing relevant evidence.

CONCLUSION

It is respectfully suggested that the decision of the Tax Court was clearly erroneous because the Tax Court:

(a) Primarily relied upon the Neuses' appraisal report and testimony. This appraisal report and testimony erroneously considered five sales that had "special value" to the buyer from sellers who did not have their property on the market, and,

(b) Relied upon assessment records which is not any evidence of value.

The United States Court of Appeals on three occasions in its Opinion, (Appendix - pp 2a, 6a & 8a), refers to the fact that the Frieders' farm apparently could have been sold in 1973 for $6,000 per acre as part of an assemblage. Such an offer is not evidence of market value. It is only

evidence of what the Crown family was willing to pay in 1973 to complete its assemblage. The fact that Frieders did not pursue the proposal to purchase at about $6,000 per acre, is only evidence of a bad business judgment. He should not be punished for electing to retain his family farm. The additional tax ($131,659.67) sought by the government would be a heavy penalty for his bad business judgment. (Appendix - p 60a).

The injustice of the Tax Court finding is illustrated by the fact that Elmer Frieders was able to sell his property for $5,000 an acre in 1980. This sale was accomplished only after the property had been on the market for a long period of time, after sewer and water became available to the property in 1980 and after a proposed road (1980)

would give the Frieders property substantial road frontage in the future. In addition, all of the witnesses, including Mr. Neuses, (p 221), testified that there has been a tremendous appreciation of value of farm land in the Fox Valley corridor.

It is respectfully submitted that the Tax Court decision is clearly erroneous - is clearly unjust. For these reasons, it is respectfully submitted that a Writ of Certiorari should issue to review the judgment of the Court of Appeals for the Seventh Circuit.

Dated, December 22, 1982.

Respectfully submitted,

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APPENDIX TO
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In the

United States Court of Appeals

For the Seventh Circuit

No. 81-2742

ESTATE OF WILLIAM A. FRIEDERS, DECEASED,
ELMER FRIEDERS, EXECUTOR,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE SERVICE,

Respondent.

Appeal from the United States Tax Court.

ARGUED JUNE 3, 1982—DECIDED AUGUST 30, 1982

Before PELL, *Circuit Judge*, GIBSON, *Senior Circuit Judge*,* and ESCHBACH, *Circuit Judge*.

GIBSON, *Senior Circuit Judge*. This is an appeal of a decision of the Tax Court as to the valuation of real estate for estate tax purposes. I.R.C. §§ 2001-2209 (1970). The estate raises two issues on appeal. The first is that the finding as to the value of the property was clearly erroneous because nearby properties which the Tax Court considered in determining the value were not comparable, and other evidence considered by the court

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* Hon. Floyd R. Gibson, Senior Circuit Judge, Eighth Circuit, sitting by designation.

was incompetent. The estate's other argument is that the Tax Court abused its discretion in refusing to consider evidence the estate presented to the court after that court had issued its decision.

I. Facts

William Frieders died on May 14, 1973, leaving an estate which included a ninety-two acre family farm. His estate valued the farm at $2,000 per acre. The Commissioner assessed a value of over $5,000 per acre. The estate brought this action in Tax Court, seeking a redetermination. At the trial, the Commissioner took the position that the estate was worth $5,000 per acre.

The following facts were adduced at trial. The Frieders farm is located in DuPage County, Illinois, about thirty miles west of Chicago. The farm is between the city of Aurora, located two and a half miles to the southwest, and the city of Naperville, six miles to the east. There was one road leading to the Frieders farm. The farm has gas, electricity, and telephone service, but did not have sewer and water service. There was discussion of construction of a freeway to be located very near the Frieders farm, but the plans have been virtually abandoned. A shopping center was proposed for a location two miles from the Frieders farm. That shopping center was completed and has over 100 stores. There was investment activity in the area at the time of Frieders' death, including activity by the Crown family of Chicago. The Crowns, acting through trusts, bought properties near the Frieders farm and made offers on others. Shortly after Frieders' death, the Crowns were willing to buy the Frieders farm and two properties owned by other persons for an average of $6,000 per acre as part of an assemblage. The other property owners wanted more than $6,000 and the sale was not consummated.

The Government presented one expert witness, Donald Neuses, who relied primarily on the selling prices of six properties near the Frieders farm. Five of the six

properties were bought by the Crowns as part of an assemblage, and the price per acre of the five properties ranged from $5,693 to $7,653. The other property sold for $5,090 per acre. Neuses testified that the Frieders farm was in the middle of a development corridor.

The estate presented three witnesses. The essence of the testimony of two of them was that the activity by the Crowns inflated the prices and made the properties relied on by Neuses not comparable. Another witness testified that the value of farmland throughout Illinois increased by 341 percent between 1973 and 1979.

The Government also attempted to show value by introducing assessment records which placed on the Frieders farm a fair market value for real estate tax purposes of $4,986 per acre for 1972.

The Tax Court found that the fair market value of the Frieders farm was $5,000 per acre. The court relied principally on the testimony and report of the Government's witness, Donald Neuses. The court agreed with Neuses that the highest and best use of the Frieders farm was a speculative, that is, an investment use.

The court filed its Memorandum Findings of Fact and Opinion on May 27, 1980. On December 20, 1980, the Frieders farm was sold for $5,000 per acre. The Tax Court decision was not entered until July 23, 1981, because of the time it took to compute the deficiency pursuant to Tax Ct. R. 155. On October 13, 1981, almost three months after the Tax Court decision was rendered, the estate submitted a motion to vacate or revise the decision based on the evidence of the actual sale price of the Frieders farm. Under Tax Ct. R. 162, such a motion must be filed within thirty days after the decision has been entered, unless the court shall otherwise permit. The court denied leave to file the motion.

II. Analysis

A. The Finding as to Value

The estate argues that the Tax Court's finding as to the value of the Frieders farm was in error. The Tax Court's determination as to fair market value is a question of fact which we will uphold unless clearly erroneous. *Tripp v. Commissioner*, 337 F.2d 432, 434 (7th Cir. 1964). The fair market value is the oft repeated concept of "the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts." Treas. Reg. § 20.2031-1(b). *See also United States v. 429.59 Acres of Land*, 612 F.2d 459, 462 (9th Cir. 1980); *United States v. 344.85 Acres of Land*, 384 F.2d 789, 791 (7th Cir. 1967).

The estate's argument appears to be that the sales of the properties near the Frieders farm were not comparable because they involved "unwilling sellers," that is, sellers who only sold their property at a premium and who could hold out for that high price because of the investor's desire and need to buy properties as part of an assemblage. The estate is implicitly arguing that a seller is "unwilling" if he is interested in selling only because of a high offer. And it is common knowledge that an assembler of large tracts of land will often have to offer premium prices to potential sellers who are indifferent about selling or not interested in selling at current market prices.

The estate's other objection to the Tax Court's valuation is that the court erred in considering evidence which was incompetent. The estate relies on *Mercer County v. Wolff*, 237 Ill. 74, 86 N.E. 708, 711 (1908), which held that records of the assessed value of a piece of property were incompetent and immaterial to show the value of the property.

Although we are concerned with the effect of this decision in light of the substantial inflation occurring the past decade, after reviewing all the evidence

presented at the trial we cannot call the Tax Court's decision clearly erroneous. First, the Tax Court found that the highest and best use of the Frieders farm was a speculative, that is, an investment use. There was substantial evidence to support this conclusion. There were plans for a large shopping center two miles from the Frieders farm. There were plans to construct a freeway very near the Frieders farm. (The project, according to the estate, can now be considered abandoned.) Even without the Crowns, there would have been some investment activity in the area.

Second, the fact that there was investment activity does not in itself make the nearby sales not comparable. The lack of investment activity is not a prerequisite to having "willing sellers." The only guidance the applicable regulation gives in defining an unwilling seller is this statement: "The fair market value . . . is not to be determined by a forced sale price." Treas. Reg. § 20.2031-2(b). The sales near the Frieders farm certainly did not involve "unwilling sellers" in the sense that there was a forced sale. Likewise, one cannot say that the people involved in the sales near the Frieders farm were literally "under any compulsion to buy or to sell." *Id.* There may be a question as to whether an "unwilling seller" exists only in a forced sale situation, *See 429.59 Acres of Land*, 612 F.2d at 462 (a willing seller is one who "desires" to sell), but we would not call a property owner an "unwilling seller" simply because his property has development potential due to its proximity to a proposed freeway.

Third, the fact that the Crowns were buying property as part of an assemblage, which could be a situation that might involve an "unwilling seller," does not change our conclusion. We can assume that the estate is correct in suggesting that the purchase of property in an assemblage makes for a higher price than if a property is sought independent of other properties. In this case, the five properties which the Tax Court used as comparables and which were part of the Crown assemblage sold for much more than $5,000 per acre. These proper-

ties sold for from $5,693 to $7,653 per acre. Also, the Frieders farm apparently could have been sold in 1973 for $6,000 per acre as part of an assemblage if the other owners were not holding out for a higher price. The Tax Court, in adopting the lower figure of $5,000 per acre, appears to have assumed that assemblage purchases bring higher prices.

Fourth, there was one comparable which was not part of an assemblage. It sold for $5,090 per acre. The estate argues that this property had greater development potential than the Frieders farm because of its size, road frontage, and the possibility of getting sewer and water service. The estate suggested at trial that the Frieders farm could not get sewer service. However, we cannot say as a matter of law its development potential—and hence its value—was substantially greater than that of the Frieders farm.

Fifth, the Tax Court did not err in considering the assessment records. *Mercer County* held that an assessor's book, offered to prove the assessment value of property, was incompetent. The court said the assessed value of the property was immaterial to the issue, although the assessor could have testified as to his judgment of the value of the property. 86 N.E. at 711. However, under Illinois law at the time of Frieders' death, assessment records could be material. An Illinois statute required that property be assessed at its "fair cash value," Ill. Rev. Stat. ch. 120 § 501(1) (1971), and defined "fair cash value" as fifty percent of the actual value. *Id. at* § 482(24). In light of this statutory requirement, the assessed value would be material. The records showed the assessed value of the Frieders farm to be $229,331, twice which is $458,662, or $4,986 per acre.

When we look at all the evidence presented to the Tax Court, we conclude that its decision was not clearly erroneous.

B. Post-trial Evidence

The estate's other argument is that the Tax Court erred in refusing to consider evidence of value of the Frieders property which came into being after the trial. The trial was held on December 11, 1979, and the Tax Court issued its findings on May 27, 1980. The Frieders farm was sold for $5,000 per acre on December 20, 1980, seven months after the Tax Court issued its findings and seven months before the final decision was issued. The property was sold after it received sewer service and plans were announced to increase the road frontage. The estate brought the sale to the attention of the Tax Court by way of a motion on October 13, 1981, almost three months after the Tax Court's July 23, 1981, decision. Because this motion was received by the Tax Court more than thirty days after its decision, the motion could be considered only by leave of the court. Tax Ct. R. 162. We must decide whether the Tax Court abused its discretion in denying the estate leave to file its motion.

This issue is important because, if the property was worth $5,000 per acre in 1980, one would consider it unlikely that the property was worth $5,000 per acre in 1973, in view of the substantial, continuing inflationary status of the economy between 1973 and 1980. Nevertheless, we cannot say that the court abused its discretion. The estate had eight months after the sale to file its motion without the need to gain the permission of the court. There was no excuse given for the delay. The court's interest in terminating litigation allowed it to refuse to consider evidence known to the estate well before the court's decision. See *Koufman v. Commissioner*, 69 T.C. 473, 476 (1977).

Furthermore, it is not clear that the additional evidence would have changed the result. It is possible that the value of the Frieders farm did not follow general inflationary trends. At the time of Frieders' death, there was a proposal for a new freeway near the Frieders farm. One would expect that anticipation of the freeway construction would inflate the price of the

Frieders farm. The later abandonment of the project would have a deflationary effect. Perhaps it is only because of inflation that the property has reascended to a value of $5,000 per acre. This possibility is supported by the fact that the Frieders farm could have been sold for $6,000 per acre, although admittedly only as part of an assemblage. Also, the provision of sewer service would undercut the estate's suggestion at trial that the Frieders farm had a low value because it was almost impossible to get this service.

The Tax Court's valuation of the Frieders property was not clearly erroneous, and the court did not abuse its discretion in refusing to consider the post-trial evidence. The judgment of the Tax Court is affirmed.

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T. C. Memo. 1980-184

UNITED STATES TAX COURT

ESTATE OF WILLIAM A. FRIEDERS, DECEASED, ELMER FRIEDERS, EXECUTOR, Petitioner v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 4253-77
Filed May 27, 1980.

MEMORANDUM FINDINGS OF FACT AND OPINION

DAWSON, Judge: Respondent determined a deficiency of $89,230.37 in petitioner's Federal estate tax. The only issue for decision is the fair market value on May 14, 1973, of approximately 92 acres of real estate located in Naperville Township, DuPage County, Ill., which was included in the gross estate of the decedent for Federal estate tax purposes.

FINDINGS OF FACT

Some of the facts have been stipulated. The stipulation of facts and

attached exhibits are incorporated herein by this reference.

Elmer Frieders is the executor of the Estate of William A. Frieders, deceased, and resided in Aurora, Ill., when the petition was filed in this case.

William A. Frieders died testate on May 14, 1973, seized of approximately 92 acres of real estate (herein referred to as the Frieders property) located in Naperville Township, DuPage County, Ill.

For purposes of reporting decedent's Federal gross estate, petitioner returned the Frieders property at a fair market value of $184,000, or $2,000 per acre.

The Frieders property is not landlocked; ingress and egress are by way

of Reckinger Road, a 60 foot wide public right-of-way which deadends at the western boundary of the property. Reckinger Road proceeds westward to Farnsworth Avenue. Farnsworth Avenue provides access to the East-West Tollway (Highway 5) which proceeds eastward to Chicago.

The downtown area of the city of Aurora is about 2-1/2 miles to the southwest of the Frieders property and the city of Naperville is about six miles to the east.

The topography of the Frieders property is gently rolling terrain with areas both slightly above and slightly below road grade. There are no drainage problems.

As of the valuation date, i.e., May 14, 1973, the Frieders property was

serviced by a private well and septic system. Available utilities in the area included gas, electricity, and telephone.

The property was zoned R-3 for residential single family uses. It is improved with an older frame farm house containing six rooms, one older frame barn, and a machine shed.

The trend in the area surrounding the Frieders property was toward the development of vacant unimproved farmland for multi-family and single family residential uses as of the valuation date.

Donald P. Neuses prepared an appraisal of the fair market value of the Frieders property as of May 14, 1973. He is a qualified expert real estate appraiser and land use planner who

personally inspected the property. It was his opinion that the fair market value of the property as of May 14, 1973, was $460,00, or $5,000 per acre.

Mr. Neuses used the market data method in making his appraisal of the Frieders property. He considered many sales in formulating his appraisal, as well as information obtained from brokers, other appraisers, and others knowledgeable about real estate prices in that area. Among the sales which Mr. Neuses considered in formulating his appraisal of the Frieders property were the sales of six parcels occurring within the vicinity of the Frieders property during 1972 and 1973, the details of which sales are fully set forth in his appraisal report. These were all bona fide sales between will-

ing sellers and willing buyers. The location, date of sale, acreage, zoning, utilities, price and price per acre of the six parcels are set forth below:

Parcel 1

Location: The west side of Eola Road, north of North Aurora Road, in an unincorporated area of Naperville Township, DuPage County, Illinois.

Date of Sale: April 12, 1972.

Acreage: 99/2; acres.

Zoning: M-2 and R-3.

Utilities: Gas, electric and telephone.

Sale Price: $502,260.

Price Per Acre: $5,693.

Parcel 2

Location: 111.924 acres located in Section 7, 8, 17 and 18, Naperville Township, DuPage County, Illinois.

Date of Sale: July 5, 1973.

Acreage: 111.924 acres.

Utilities: Gas, electric and telephone.

Sale Price: $839,430.

Price Per Acre: $7,500.

Parcel 3

Location: North of North Aurora Road, and east of Shore Road, in an unincorporated area of Naperville Township, DuPage County, Illinois.

Acreage: 34 acres.

Zoning: R-3.

Utilities: Well and septic.

Sale Price: $173,088.

Price Per acre: $5,090

Parcel 4

Location: The west side of Eola Road, approximately 1,200 feet south of Claim Street, unincorporated Naperville Township, DuPage County, Illinois.

Date of Sale: March 29, 1972.

Acreage: 19.58 acres.

Zoning: R-3.

Utilities: Well and septic.

Sale Price: $149,850.

Price Per acre: $7,653.

Parcel 5

Location: Along the south side of Aurora Road, just east of the DuPage County-Kane County Line, unincorporated Naperville Township, DuPage County, Illinois.

Date of Sale: March 17, 1972.

Acreage: 34.72 acres.

Zoning: R-3.

Utilities: Well and septic.

Sale Price: $224,690.

Price Per Acre: $6,472.

Parcel 6

Location: South of Molitor Road, just east of the Kane County Line, unincorporated Naperville Township, DuPage County, Illinois. (Lorenz's Farm)

Date of Sale: September 13, 1972.

Acreage: 104.81 acres.

Zoning: R-3.

Utilities: Well and septic.

Sale Price: $602,657.50.

Price Per Acre: $5,750.

The Frieders property and the six parcels used by Mr. Neuses as comparables are all located within about two miles of one another, with Parcel 6 being contiguous to the Frieders Property to the east and Parcel 2 being contiguous to the south.

The Frieders property (as of May 14, 1973) and the six parcels (as of their respective sale dates) were comparable properties.

In formulating his appraisal of the Frieders property, Mr. Neuses took into account and adjusted for the various differences affecting value, including physical characteristics, zoning, frontage, and location of the comparable properties.

During the early 1970's, there was discussion of a proposed freeway, the Fox Valley Freeway, to be located in the western part of Naperville Township. Real estate prices at that time were rising in the Naperville Township.

In early 1973, real estate investors and sellers were put on notice of a significant, contemplated land use shift from agricultural to residential uses, to be highlighted by the construction of the Fox Valley Shopping Center. It is a large shopping center containing more than 100 stores, including Sears, J. C. Penney, Lord & Taylor, and Marshall Field. It is located about two miles to the southeast of the Frieders property.

During 1972 and 1973 there were at least three major investors purchasing

property in the vicinity of the Frieders property, namely, the Crowns, a wealthy Chicago family, Metropolitan Structures, Inc., a very substantial developer, and Urban Investment and Development, Inc.

The Frieders property is in a corridor bounded by the Fox Valley to the west, which is expanding eastward, and western DuPage County, which is expanding westward. The corridor has experienced substantial growth.

The highest and best use of the Frieders property as of the valuation date was a speculative, i.e., an investment, use.

All of the properties which the Crowns acquired in the vicinity of the Frieders property were purchased through nominees and held in land

trusts. The purpose of using nominees was to keep the identity of the Crowns, as the real purchasers, secret; the purpose of using land trusts, with the trustees as legal title holders, was to keep the identity of the Crowns, as the real owners,secret.

Real estate sellers in the Naperville Township did not know they were dealing with the Crowns, nor did they know what properties the Crowns owned.

Gerald Anderson, a real estate broker, was employed by the real estate firm of Bennett & Kahnweiler to assist in purchasing properties on behalf of the Crowns in the Naperville Township. In 1973 Mr. Anderson attempted to assemble three properties, including the Frieders property, for which the average price to be paid was about $6,000

per acre. However, the sale was not consummated. One of the property owners wanted $8,500 per acre for his property. One wanted in excess of $6,000 per acre.

The Frieders property (exclusive of improvements) was determined in 1972 to have a fair market value for DuPage County real estate tax purposes of $458,712 or $4,986 per acre.

ULTIMATE FINDING OF FACT

The fair market value of the Frieders property on May 14, 1973, was $460,000 or $5,000 per acre.

OPINION

We are confronted here with one factual issue -- the fair market value of the Frieders property on May 14, 1973. Petitioner contends that the property had a fair market value on

that date of $184,000 or $2,000 per acre. To the contrary, respondent now maintains that its value was $460,000 or $5,000 per acre. [1]

We agree with the respondent and, in making our ultimate finding of fact, we have relied principally upon the appraisal report of and testimony of Donald P. Neuses, who was respondent's expert witness. Our reasons are set forth below.

Section 2031 [2] provides that the value of the gross estate of a decedent shall be determined by, including the value at the time of his death, all property wherever situated. Section 20.2031-1(b), Estate Tax Regs., provides that the value of every

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(1) In his notice of deficiency, respondent determined that the fair market value of the property was $483,000 or $5,250 per acre.

(2) All section references are to the Internal Revenue Code of 1954, as amended and in effect at the time of the decedent's death on May 14, 1973.

item includable in the decedent's gross estate, with exceptions not applicable here, shall be its fair market value at the time of the decedent's death, and that the fair market value is the price at which the property would change hands between a willing buyer and and a willing seller, neither being under any compulsion to buy or sell and both having knowledge of relevant facts.

Respondent supported his determination in this case with the expert opinion of an experienced local real estate appraiser and with documentary evidence buttressing the opinion. The

evidence consisted of an appraisal report by and the testimony of Donald P. Neuses concerning the value of the Frieders property as of May 14, 1973. Mr. Neuses is an independent local appraiser with 22 years of real estate appraisal experience. He is a member of the American Society of Appraisers and of the American Institute of Appraisers. He has taught courses about appraising; he has written an article about it; and he has acted as consultant to various local agencies and municipalities, including the State of Illinois. He has appraised numerous parcels of land in the Naperville Township and is familiar with the market trends in the area. In addition to his appraisal experience, Mr. Neuses has also had land use planning ex-

perience; he was a member of the American Society of Planning Officials; and he was former chairman of the Lombard, Illinois, Planning Commission.

It was the expert opinion of Donald P. Neuses, based upon his personal inspection of the Frieders property and upon the results of his research, that the fair market value of the Frieders property, as of the valuation date, was $460,000, or $5,000 per acre. His appraisal report sets forth pertinent city and neighborhood data concerning the cities most proximate to the Frieders property (viz., Aurora, less than three miles to the west, and Naperville, about six miles to the east), information concerning the physical characteristics, location,

configuration of the property, its accessibility to roads, and his observations that the trend in the surrounding area has been toward the development of vacant unimproved farmland for multi-family and single family residential uses.

In his appraisal report, Mr. Neuses set forth the three generally accepted and used methods of appraisal -- the income method, the replacement method, and the market data (or comparable sales) method. He chose the market data method in valuing the Frieders property because, in his opinion, it was the most appropriate method in this case for valuing raw land. [3] The market data method consists of gathering sales data respecting sales of comparable sites, then analyzing the

data and making adjustments for various differences between the comparables and the property being appraised which affect value, such as size, location, availability of utilities, and availability of access.

Mr. Neuses testified, and his appraisal report states, that he considered many sales in formulating his appraisal, as well as information obtained from brokers, other appraisers, and others knowledgeable about real estate prices in the area of the Frieders property. His appraisal report sets forth particulars concerning the sales of six parcels within the vicinity of the Frieders property. Mr. Neuses stated that he considered the six parcels to be comparable to the Frieders property. He also stated

that, in formulating his appraisal, he took into account and adjusted for various differences affecting value, such as time, location, configuration, availability of utilities, and road frontage.

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(3) Although various structures exist on the Frieders property, Mr. Neuses disregarded these in formulating his appraisal, since, in his view, they added little to the value of the land because of their age.

We are persuaded that elements of comparability existed between the Frieders property as of the valuation date and the six parcels selected by Mr. Neuses as of their respective sales dates. These elements are:

(1) All the properties were zoned similarly.

(2) All were located in unincorporated areas of the Naperville Township.

(3) All had structural improvements.

(4) All are within two miles of one another (with Parcel 6 being contiguous to the east and Parcel 2 being contiguous to the south).

(5) All were without sewer and water utilities.

(6) Parcels 1, 2, and 6 and the Frieders property have about the same acreage.

(7) Parcel 6 has only modest frontage on Molitor Road, and Parcels 4 and 5 also have only modest frontage.

The time differential between dates of sale of the six parcels and the valuation date also points to compar-

ability. Parcels 1 and 4 were sold about one year prior to the valuation date, and Parcel 6 was sold about eight months prior thereto, all during a period of rising land prices in Naperville Township. Sales of Parcels 2 and 3 occurred within two months after the valuation date.

As to the highest and best use of the Frieders property, it was the opinion of Mr. Neuses that, as of the valuation date, it was a speculative, i.e., investment, use.

Mr. Neuses further testified that he was familiar with the market trends and conditions in the general area of the Frieders property around the valuation date. According to him, the Fox Valley (embracing the city of Aurora) was expanding eastward. A corridor of

land, including the Frieders property, which Mr. Neuses denominated the "Fox Valley corridor," bounded by the Fox River to the west and western DuPage County to the east, experienced tremendous developmental growth. In support of his determination of highest and best use, Mr. Neuses pointed to several socio-economic forces influencing the Naperville Township market around the valuation date, including the presence of a prominent investor (the Crowns) in the corridor, the proposal of the Fox Valley Freeway, and the announcement of the construction of a major regional shopping center, viz., the Fox Valley Shopping Center.

In addition to Mr. Neuses' opinion of fair market value, respondent offered in evidence certified copies of

two DuPage County Property Record Cards reflecting that the Frieders property (exclusive of improvements) was determined, for DuPage County real estate tax purpose, to have a fair market value in 1972 of $458,712, or $4,986 per acre. [4] This Court has approved the use of such assessments as one indicator of value when, as in this case, the relation between assessed value and fair market value is demonstrated. See Kelly v. Commissioner, 18 B.T.A. 1049 (1930); Fisher v. Commissioner, 3 B.T.A. 679 (1926).

Respondent's position is further supported by evidence showing that at about the same time Gerald Anderson tried to

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(4) Ill. Rev. Stat., ch. 120, §499 (1971) provides that all real and personal property within the State of

Illinois shall be assessed and taxed, except as so much hereof as may be exempt by statute. Ill. Rev. Stat., ch. 120, §501 (1971) provides that each tract or lot of real property shall be valued at its fair cash value. Ill. Rev. State., ch. 120, §482 (24) (1971) provides that the term "fair cash value" means 50 percent of the actual value of real and personal property, except in counties with a population of more than 200,000 which classify real property for purposes of taxation. DuPage County has never classified and does not currently classify real property for purposes of taxation. The 1972 assessment figures relating to the Frieders property per the property record cards total $229,331, twice which is $458,662.

acquire the Frieders property on behalf of the Crowns for about $6,000 per acre, but Elmer Frieders would not accept it; that there was discussion of the proposed Fox Valley Freeway to be located near the Frieders property; that there was the public announcement of the construction nearby of the Fox Valley Shopping Center; that major developers and the Crown family were acquiring land in the vicin-

ity of the Frieders property; and that the Frieders property lies in a corridor of real estate which experienced tremendous developmental growth.

Petitioner relies strongly on the testimony of Gerald Anderson, a real estate broker and builder, in contending that the sales of five of the six parcels used as comparables by Mr. Neuses involved "unwilling sellers." We reject this contention for several reasons. First, it is not supported by the evidence. It is nothing but lay opinion. Mr. Anderson provided no basis for his opinion other than the fact that he had to contact some of the sellers on more than one occasion and, to the best of his knowledge, when he contacted each of them, only one had previously listed his property for sale. This is certainly not

probative of the seller's state of mind and it fails to establish that each seller was "unwilling" at the time of sale, at which point each seller had presumably struck what he considered to be a satisfactory and fair bargain. Second, it is significant that petitioner did not call any of the sellers to testify at trial, which permits the inference that the sellers would not have testified favorably to petitioner. Interstate Circuit v. United States, 306 U.S. 208 (1939); Wichita Terminal Elevator Co. v. Commissioner, 6 T.C. 1158, 1165 (1946), affd. 162 F.2d 513 (10th Cir. 1947). Third, the petitioner's interpretation of the term "unwilling seller" is strained. It implies that a person who does not offer his property for sale or does not immediately accept an offer when made is

an "unwilling seller." This is incorrect. Moreover, an "unwilling seller" has been traditionally viewed as a financially embarrassed person who is forced to sell property for less--not more--than its fair market value. In short, we give no weight to Mr. Anderson's opinion as to the fair market value of the Frieders property on May 14, 1973.

Petitioner also offered the testimony of Wilton Battles, a land use and zoning consultant, in support of his arguments that (1) all of the parcels used by Mr. Neuses are more desirable than the Frieders property from the standpoint of a land developer and (2) because of certain real estate assemblage activity which occurred in the vicinity of the Frieders property around the valuation date, the prices paid for the six parcels

are not reflective of the fair market value of the Frieders property.

Mr. Battles identified an aerial photograph showing the Naperville Township, an overlay showing the proposed location for the Fox Valley Freeway and interchanges, an overlay showing soil conditions on the Frieders property and surrounding parcels, an overlay showing what Petitioner denominated "the Crown assemblage" (a group of properties allegedly acquired by the Crowns), and a map showing the public sewer system of the Aurora Sanitary District. In substance, Mr. Battles expressed his opinion "from a land use planner's point of view" as follows:

(1) During the early 1970's, there was discussion of a freeway, i.e., the Fox Valley Freeway, which was proposed to

be located in the western part of Naperville Township, and some of the six parcels used by Mr. Neuses would have benefited from having frontage on or proximity to the proposed freeway.

(2) The Frieders property suffered from certain developmental handicaps, i.e., lack of access to a public sewer and water system, poor soil conditions for septic system development, lack of road frontage, poor access, and poor configuration. The Frieders property was not in the Aurora Sanitary District as of the valuation date, and overcoming the sewer problem would be costly.

(3) Some of the six parcels acquired value as part of the Crown assemblage.

We do not find Mr. Battles' opinion persuasive. First, even if the proposed

location of the freeway would have had a positive, rather than a negative, effect on the value of the properties near it, there is no reason to believe that the value of the Frieders property would not have also been enhanced by its proximity to the freeway and interchanges. We note that Parcels 3, 5 and 6 would not have fronted on the freeway, yet all of them sold for more than $5,000 per acre. Second, Mr. Battles' criticisms of the physical characteristics of the Frieders property were, for the most part, applicable to the six parcels as of their respective dates of sale. Third, we think that Mr. Battles' testimony that some of the six parcels acquired post-assemblage suitability for development and enhanced value adds nothing to the Petitioner's case. Even if we assume that

the Crown assemblage would have enhanced the value of the six parcels by increasing developmental possibilities, there is no reason to assume that it would not have similarly enhanced the value of the Frieders property if it had been added to an assemblage. We think the evidence in this record shows that the six parcels used by Mr. Neuses, as of their respective dates of sale, and the Frieders property, as of its valuation date, shared many of the same characteristics which Mr. Battles criticized. Hence, either all of these properties, viewed in isolation from one another, are marginal pieces of agricultural property or all are suitabl for other uses. Furthermore, if Mr. Battles was suggesting that the prices paid for the six parcels reflected their fair market value as seen

against the backdrop of the Crown assemblage, then such suggestion assumes that the sellers of these parcels were aware of the Crowns and their acquisition designs, an assumption which the record does not support and which points to the conceptual difficulty in Petitioner's case.

Petitioner introduced into evidence two United States Department of Agriculture tables which reflect average price level changes in Illinois farm land during the past decade and six newspaper advertisements dated from July through October, 1979, offering the Frieders property for sale at $5,500 per acre. Petitioner argues, in substance, that he was unable to sell the Frieders property for $5,500 in late 1979 and that since, according to his interpretation of the

Department of Agriculture tables, it would be worth about three times more than it was in 1973, it must have been worth less than $2,C00 in 1973. We do not agree. The Department of Agriculture tables purport to reflect only statewide price level changes and do not purport to reflect price changes in any particular locality, such as the Naperville Township. Petitioner made no effort to show that the real estate market and socio-economic climate in late 1979 in the Naperville Township were the same as in 1973. Consequently, whether or not Petitioner was unable to sell the Frieders property in late 1979 is irrelevant to the issue of its fair market value on May 14, 1973.

All in all, it is our judgment that the most reliable evidence and the most

accurate opinion of the fair market value of the Frieders property on May 14, 1973, is contained in the appraisal report of Donald P. Neuses. Accordingly, we have found and hold that its fair market value on that date was $460,000 or $5,000 per acre.

Decision will be entered under Rule 155.

UNITED STATES TAX COURT

ESTATE OF WILLIAM A. FRIEDERS, DECEASED, ELMER FRIEDERS, EXECUTOR,	)	
Petitioner,	)	
vs.	)	Docket No.
COMMISSIONER OF INTERNAL REVENUE,	)	4253-77
Respondent.	)	

MOTION TO VACATE AND/OR REVISE DECISION

Petitioner, by his Attorneys, DI MONTE & LIZAK, moves the Court to set aside the finding returned in the above-entitled action on May 27, 1980, and the decision entered thereon pursuant to Rule 155 computation entered on July 23, 1981, and to revise the decision or grant a new trial on the ground of newly discovered evidence of which Petitioner was ignorant at the time of the trial

herein, and in fact did not exist at the time of the trial herein and which he could not have sooner discovered in the exercise of due diligence. The said evidence is not merely cumulative or impeaching in character, but is material and of such character that if received at trial, it would probably have resulted in a different finding. The new evidence, which is set forth in the Affidavits of ELMER FRIEDERS and GERALD ANDERSON attached hereto, would establish:

1. On May 27, 1980, this Court entered a finding that the Frieders' farm consisting of approximately 92 acres had a value on May 14, 1973, of $460,000.00 or $5,000.00 per acre.

2. Thereafter, two changes in circumstances affecting the value of such property took place:

(a) The City of Aurora adopted a plan to build the "Indian Trail Extension", a road that would connect the East Indian Trail Road with the North Aurora Road in the early 1980's. As a consequence, the southern portion of the Frieders property will have over 1,000 feet of road frontage on Indian Trail Extension. At the present time, the property is landlocked with no road frontage, except for 33 feet of Reckinger Road which dead-ends at the property's western boundary; and,

(b) The Aurora Sanitary District revised its plans to service the upper Waubonsia service area by the installation of a new pump station at Farns-

worth Avenue and Dearborn. As a result thereof, the Frieders' property will be serviced by the Farnsworth Water District. The foregoing revision allows the Frieders property to hook up in the summer of 1981 to a readily available outlet for sanitary sewers that presently run to the western boundary of the Frieders' property. The above revision to the sewer service did not take place until after July 10, 1980. On such date, the Circuit Court for the Sixteenth Judicial Circuit, Kane County, Illinois, in case number 90 MR 48 entered a Declaratory Judgment mandating such revision. Elmer Frieders was not

a party to such litigation.

3. The publication of the proposed road extension and the change in the area to be serviced by the Farnsworth Sewer District greatly increased the value of the Frieders' property.

4. Petitioner learned of the foregoing changes in early fall of 1980.

5. As a result of the increase in value caused by such changes, Petitioner was able to sell his property pursuant to an agreement dated December 20, 1980, for $5,000.00 per acre. The sale closed on March 24, 1981.

6. That the actual acreage of the subject property is 91.7 acres. Only 90.644 acres are marketable. The remaining 1.056 acres are landlocked. There is no easement ensurable by a title company allowing access to the small parcel.

7. The fair market value of the property on May 14, 1973 was no more than $2,000.00 per acre as established by the recent change in circumstances and sale of the property.

WHEREFORE, Petitioner prays that this Court enter an Order:

(a) Vacating the finding of this Court that the property had a market value of $5,000.00 per acre, and the decision of this Court entered pursuant to such finding, and enter a new finding that based upon the newly discovered evidence and all of the other evidence presented at trial, the market value of the Frieders' property on May 14, 1973, was $2,000.00 per acre, and enter a decision on such finding; or,

(b) Grant Petitioner a new trial.

Respectfully submitted,

_____

One of the Attorneys for Petitioner

UNITED STATES TAX COURT

ESTATE OF WILLIAM A. FRIEDERS, DECEASED, ELMER FRIEDERS, EXECUTOR,	)	
Petitioner,	)	
vs.	)	Docket No. 4253-77
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent.	)	

AFFIDAVIT OF ELMER FRIEDERS

ELMER FRIEDERS, being first duly sworn on oath, deposes and says:

1. He is the Executor of the Estate of William A. Frieders and the sole beneficiary of such estate.

2. That on December 20, 1980, he entered into an agreement to sell the Frieders' property. A copy of such agreement is attached as Exhibit "A".

3. On February 26, 1981, he and the buyers of such property executed escrow instructions amending such agreement,

whereby Frieders sold 90.644 acres of the Frieders' property at $5,000.00 per acre. A parcel equal to 1.056 acres was excluded from the sale because the title company, Chicago Title & Trust Company, would not insure title to such property. The small parcel is landlocked with no easement allowing access to such parcel. Copies of the escrow instructions dated February 10, 1981, but actually executed on February 26, 1981, the Closing Statement deposited with the Escrowee on such date, and that part of a Survey dated February 4, 1981, setting forth the legal description and acreage, are attached hereto as Group Exhibit "B".

4. The Frieders' property has been for sale by me for a number of years, including all of 1980 up until the time Exhibit "A" was executed on December 20, 1980.

5. During the two-month period immediately prior to December 20, 1980, two potential buyers with knowledge of the proposed road extension and sewer availability entered into negotiations with me for the sale of the Frieders property. Prior to the negotiations set forth in the above sentence, I received no written offers from any prospective purchaser in 1980 and received only one oral offer to purchase the property for the sum of $300,000.00 ($3,271 per acre). No further negotiations resulted when I indicated that I would require at least $5,000 per acre before I sold the property.

ELMER FRIEDERS

SUBSCRIBED & SWORN to before me this 8th day of July, 1981.

NOTARY PUBLIC

UNITED STATES TAX COURT

ESTATE OF WILLIAM A. FRIEDERS, DECEASED, ELMER FRIEDERS, EXECUTOR,	)	
Petitioner,	)	
vs.	)	Docket No. 4253-77
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent.	)	

AFFIDAVIT OF GERALD ANDERSON

GERALD ANDERSON, being first duly sworn on oath, deposes and says:

1. I am a real estate broker and developer. I am familiar with the Frieders' property and its history of road frontage and availability of sewer and water.

2. I introduced the Frieders' property to Shakeab Alshabkhoun in early 1980. Mr. Alshabkhoun evinced no interest in such property when he was advised that

Elmer Frieders was asking $5,000.00 per acre.

3. In early fall of 1980, I ascertained that the City of Aurora had adopted a plan to build the "Indian Trail Extension", a road that would connect the East Indian Trail Road with the North Aurora Road in the early 1980's. As a consequence, the southern portion of the Frieders' property will have at least 1,000 feet of road frontage on Indian Trail extension.

A letter dated October 9, 1980 from the Commissioner of Public Works of the City of Aurora, confirming such advice, was received by me a few days after the date of such letter. A copy of such letter is attached as Exhibit "A". A copy of an arterial road schedule showing such proposed road in blue is attached as Exhibit "B". The Frieders' property

is outlined in red.

4. In early fall of 1980, I also ascertained that the Aurora Sanitary District revise its plan to service the upper Waubonsia service area by the installation of a new pump station at Farnsworth Avenue and Dearborn. This change came about as a consequence of a Declaratory Judgment mandating such revisions of service. Elmer Frieders was not a party to such litigation. As a result thereof, the Frieders' property will be serviced by the Farnsworth Water District. The foregoing revision allows the Frieders property to hook up in the summer of 1981 to a readily available outlet for sanitary sewers that presently run to the western boundary of the Frieders' property. A copy of a letter from the consulting engineers for such project dated December 15, 1980,

together with the Exhibits referred to in such letter, and the decree in declaratory judgment, are attached hereto as Exhibit "C".

5. I advised Elmer Frieders and Shakeab Alshabkhoun of such proposed road extension and change in water and sanitary sewer service shortly thereafter.

6. Shakeab Alshabkhoun, after he learned of such proposed changes, agreed to pay $5,000.00 per acre for the Frieders' property.

7. The publication of the proposed road extension and the availability in the near future of sewer and water from the Farnsworth Water District caused the Frieders' property to rise in value appreciably. As a consequence, Shakeab Alshabkhoun agreed to purchase such property at the price of $5,000.00 per

acre.

GERALD ANDERSON

SUBSCRIBED & SWORN to before me this
3rd day of June, 1981.

NOTARY PUBLIC

UNITED STATES TAX COURT
WASHINGTON, D.C. 20217

ESTATE OF WILLIAM A. FRIEDERS, DECEASED, ELMER FRIEDERS, EXECUTOR, Petitioner,	)	
vs.	)	Docket No. 4253-77
COMMISSIONER OF INTERNAL REVENUE, Respondent.	)	

ORDER

On October 13, 1981, the Court received a Motion to Vacate and/or Revise Decision submitted by petitioner in this case. The Memorandum Findings of Fact and Opinion (T.C. Memo. 1980-184) was filed herein on May 27, 1980, and a Decision and Memorandum Sur Decision were entered herein on July 23, 1981. Rule 162, Tax Court Rules of Practice and Procedure, provides that a motion to vacate or revise a decision shall be filed within 30 days after the decision is entered unless the Court shall otherwise permit. In the circumstances of this case and in the exercise of the Court's discretion, leave to file the motion to vacate the decision will not be permitted or granted. Accordingly, it is:

ORDERED: That the Clerk of the Court is hereby directed not to file the Motion to Vacate and/or Revise Decision and the affidavits of Elmer Frieders and Gerald Anderson and he is further directed to return the motion and affidavits to petitioner's counsel.

HOWARD A. DAWSON, JR.
JUDGE

Dated: Washington, D.C.
October 15, 1981

Internal Revenue Service
District Director

Date: OCT. 7, 1982

WILLIAM A. FRIEDERS
C/O ELMER FRIEDERS EXECUTOR
ATE D BOX 493
AURORA, IL. 60504

Department of the Treasury
Internal Revenue Service
1919 S. Highland Avenue
Building C.
Lombard, IL. 60148
Social Security or
Employer Identification Number:
344-10-8352V
Person to Contact:
G.B. PUFFETT
Contact Telephone Number:
312-932-7243

We have previously written you requesting payment of the Federal taxes shown below, but we have no record of receiving your payment. If you have recently made a payment that has not been credited to your account, please let us know.

If you have not yet sent us your payment, you should pay the total amount due within 10 days from the date of this letter to avoid additional interest and penalties. Please make your check or money order payable to the Internal Revenue Service and write your identification number, shown above, on it. An addressed envelope is enclosed for your convenience.

If you are unable to pay the amount due in full, or if you want to discuss installment payments, please contact the person whose name and telephone number are shown above. This should be done within 10 days from the date of this letter.

Sincerely yours,

G.B. Puffett
REVENUE OFFICER

Enclosure:
Envelope

Form Number	Tax Period	Tax Balance	Accumulated Penalty	Accumulated Interest	Total Amount Due
706	5-14-73	116,818.03	358.64	13,250.00	$131,657.67

Letter 726(DO) (7-77)

Office-Supreme Court, U.S.
FILED
FEB 4 1983
ALEXANDER L. STEVAS
CLERK

No. 82-1081

In the Supreme Court of the United States

OCTOBER TERM, 1982

ESTATE OF WILLIAM A. FRIEDERS, DECEASED,
ELMER FRIEDERS, EXECUTOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1081

ESTATE OF WILLIAM A. FRIEDERS, DECEASED,
ELMER FRIEDERS, EXECUTOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

In this federal estate tax case, the decision below affirmed the Tax Court's factual finding as to the fair market value of a parcel of real estate and the Tax Court's post-trial ruling denying petitioner leave to file an untimely motion to vacate its decision. The case is fact-bound and does not warrant further review by this Court.

The pertinent facts may be summarized as follows: William Frieders died on May 14, 1973, owning, inter alia, approximately 92 acres of real estate located in Naperville Township, DuPage County, Illinois, about 30 miles west of Chicago (Pet. App. 2a, 10a). For estate tax purposes, petitioner valued this property at $2,000 per acre (Pet. App. 2a, 10a). On audit, the Commissioner determined a deficiency, based upon a value of more than $5,000 per acre (Pet. App.

2a, 23a).[1] Petitioner brought this proceeding in Tax Court, seeking a redetermination of the deficiency (Pet. App. 2a). At trial, the Commissioner presented a witness who valued the property at $5,000 an acre, based primarily on the selling prices of six properties located near the Frieders farm. Five of the six properties were bought by an investors' trust as part of an assemblage at prices ranging from $5,693 to $7,653 an acre. The sixth property sold at $5,090 an acre. The Commissioner also attempted to show the fair market value of the property by introducing county assessment records which, pursuant to an Illinois statute requiring that property be assessed at its fair cash value, placed a value on the Frieders farm of $4,986 an acre for 1972. Petitioner presented two witnesses who testified that the properties relied on by the Commissioner's expert were not comparable because they involved sellers who were induced to sell only because of the high prices arising out of the investors' need to buy properties as part of an assemblage. Another witness on behalf of petitioner testified that the value of Illinois farmland generally increased by 341 per cent between 1973 and 1979 (Pet. App. 2a-3a).

The Tax Court, relying principally on the testimony and report of the Commissioner's witness, found that the fair market value of the Frieders farm was $5,000 an acre in

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[1]The pertinent statute is Section 2031(a) of the Internal Revenue Code of 1954 (26 U.S.C.), which provides that the gross estate of a decedent shall include the value of all property owned by the decedent at the time of death. Such property is to be included at its "fair market value at the time of the decedent's death." Treasury Regulations on Estate Tax (1954 Code), Section 20.2031-1(b) (26 C.F.R.) Fair market value is measured by what a willing buyer would pay a willing seller when neither is under any compulsion to buy or sell the property and both are reasonably informed as to all relevant facts. *Ibid.* See also *United States* v. *429.59 Acres of Land*, 612 F.2d 459, 462 (9th Cir. 1980); *United States* v. *344.85 Acres of Land*, 384 F.2d 789, 791 (7th Cir. 1967).

1973 (Pet. App. 43a). After the Tax Court filed its Memorandum Findings of Fact and Opinion, but seven months before the Tax Court entered its decision (which was delayed due to the time taken to compute the deficiency under Tax Ct. R. 155), the Frieders farm was sold on December 20, 1980, for $5,000 an acre. Approximately 10 months later, on October 13, 1981 — nearly two months after the deadline for filing such a motion under Tax Court Rules — petitioner submitted a motion to vacate or revise the decision based on the evidence of the actual sales price of the Frieders farm. The Tax Court denied leave to file the motion out of time (Pet. App. 3a, 44a, 58a).

The court of appeals held that the Tax Court finding as to valuation was not clearly erroneous and that the Tax Court did not abuse its discretion in refusing to consider the post-trial evidence (Pet. App. 8a).

1. The court of appeals properly concluded that there was ample evidence to support the Tax Court's finding as to valuation. Such a factual question does not warrant further review by this Court. *Comstock* v. *Group of Institutional Investors,* 335 U.S. 211, 214 (1948). Petitioner renews its argument (Pet. 12-20), rejected by the courts below, that the sales relied upon by the Commissioner's witness were not of properties comparable to the Frieders farm. Petitioner points out that other courts in other factual contexts have seen fit to exclude evidence of particular sales. In this instance, however, the sales in question were of similar farmland in close proximity to the Frieders farm, and they occurred at about the time of the decedent's death. The fact that five of the properties had been sold as part of an assemblage — which is the crux of petitioner's argument —is a purely factual matter that goes to the weight and not the admissibility of the sales. As the court of appeals noted, one comparable property that was not part of an assemblage

had been sold for $5,090 an acre, and, at all events, the Tax Court's finding "appears to have assumed that assemblage purchases bring higher prices" (Pet. App. 6a).

2. The court of appeals likewise correctly upheld the Tax Court's admission of assessment records as evidence of the property's fair market value because at the time of the decedent's death, Illinois law required that the assessed value be related to market value. Under Ill. Rev. Stat. ch. 120, § 501 (1971), property had to be assessed at its "fair cash value," defined as fifty percent of the actual value (*id.* § 482(24)). *Mercer County* v. *Wolff*, 237 Ill. 74, 86 N.E. 708, 711 (1908), upon which petitioner relies (Pet. 21-24), is distinguishable. There, the trial court refused to admit the assessed value of property as shown in the assessor's records. There was no attempt in that case to establish any connection between assessed value and fair market value.

3. The court of appeals also correctly held (Pet. App. 7a-8a) that the Tax Court did not abuse its discretion in denying petitioner leave to file its untimely motion to vacate the Tax Court decision. Under Tax Court Rules, such a motion must be filed within 30 days after the decision has been entered, unless the court shall otherwise permit. Tax Ct. R. 162. Thus, petitioner had eight months after the sale in which it could have filed a motion without the court's permission. Since petitioner gave no excuse for the delay, the court of appeals properly concluded that the interest in avoiding piecemeal and protracted litigation justified the Tax Court's refusal to consider evidence known to the petitioner long before the decision was entered. See *Kouf-man* v. *Commissioner*, 69 T.C. 473, 476 (1977). At all events, as the court of appeals noted (Pet. App. 7a-8a), the

additional evidence would have been of dubious significance, since it appears that the value of the Frieders farm was inflated in 1973 by the anticipated nearby construction of a new freeway, plans for which had been abandoned by the time of the property's sale in 1980.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

FEBRUARY 1983

DOJ-1983-02

Office-Supreme Court, U.S.
FILED
FEB 19 1983
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82 - 1081

Estate of William A. Frieders, Deceased,
Elmer Frieders, Executor, Petitioner

v.

Commissioner of Internal Revenue

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

CHESTER A. LIZAK
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(312) 775-9339

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-1081

Estate of William A. Frieders, Deceased,
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v.

Commissioner of Internal Revenue

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

Contrary to the Commissioner's argument, this case is not "fact-bound". There is very little dispute as to the facts in this case. The erroneous evidentiary rulings of the Tax Court are the matters in issue.

The Tax Court's finding as to fair market value of the Frieders' family farm depends entirely upon incompetent

evidence. The decision of the Seventh Circuit Court of Appeals, in affirming the Tax Court, is in conflict with Illinois and federal decisions. The Respondent could not cite a single authority to support the decisions below. The Frieders' decision is a derelict on the sea of United States law that will create confusion for taxpayers faced with these valuation issues in the future.

1. The Respondent has attempted to finesse the Tax Court's error in relying upon the testimony of Mr. Neuses, the commissioner's appraiser. Five of the six sales relied upon as comparables by Mr. Neuses were sales to a single buyer putting together an assemblage near the Frieders' property.

The Respondent ignores the Illinois and Tax Court decisions that held that sales with a special value to the buyer, such as a key sale in an assemblage, are

not "comparable" sales and are not admissible as evidence of market value. (Henry Finck Co., 4 BTA 1188, (1926); Department of Transportation vs. Prombo, 63 Ill. App. 3d 407, 379 N.E.2d 953, (3d Dist. 1978); Trustees of Schools of TP., etc. vs. Chicago City B & T Co., 126 Ill. App. 2d 302, 262 N.E.2d 80 (1970).)

Respondent evasively labels this error as "a purely factual matter that goes to the weight and not the admissibility of the sales". (P.3) He sets forth no authority in support of this position. Examination of the cases cited by Petitioner reveals why - - such sales are inadmissible as a matter of law.

2. Respondent, likewise, evades the Tax Court's error in admitting assessment records as evidence of the property's fair market value. Petitioner cited five cases from the State of Illinois and the

Fourth Circuit Court of Appeals. County of Mercer v. Wolff, 237 Ill. 74, 86 N.E. 708, (1908), Lewis v. Englewood Elevated R.R. Co., 223 Ill. 223, 79 N.E. 44 (1906); City of Chicago v. Building Corp., 11 Ill. 2d 431, 143 N.E.2d 40 (1957); Dept. of Public Works v. Cohen, 9 Ill. App. 3d 85, 291 N.E.2d 883 (3d Dist. 1972). United States v. Certain Parcels of Land, 261 F. 2d 287, (4th Cir. 1958).

In his memorandum in opposition, the Respondent was again incapable of citing any authority to the contrary, nor was any attempt made to deal with the rationale of these cases. Instead, Respondent asserts that one of the five cases, Mercer County v. Wolff, 237 Ill. 74, 86 N.E. 708, (1908), is distinguishable. Despite this assertion, Mercer and the four other cases cited by Petitioner are crystal clear - - assessment records are

incompetent as evidence of a property's fair market value and are not admissible in evidence.

The petition for a writ of certiorari should be granted because the Seventh Circuit's decision, in affirming the Tax Court's errors, is in conflict with Illinois and federal decisions on the issues. Elmer Frieders should not be required to pay over $130,000.00 in additional taxes (appendix P. 60A) because of the valuation error by the Tax Court. The Frieders' decision is simply bad law on valuation evidence. The court should grant the petition for writ of certiorari to put an end to the conflict that has been created by the Frieders' decision.

Respectfully submitted,

CHESTER A. LIZAK
ALBERT KORETZKY

Di Monte & Lizak